



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 107 OF 2014

VINCENT ONYANGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 213 of 2014 in the Senior Resident Magistrate's at Tamu)

J U D G M E N T

1). The appellant was charged with the offence of Defilement contrary to section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence are that on the 25th January 2012 at about 2 pm at [particulars withheld] Village, Emuhaya District within Vihiga County intentionally and unlawfully caused his penis to penetrate the vagina of C O a child aged 4 years.

2). The alternative charge was committing an Indecent Act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.

The particulars were that on the 25th January 2012 at 2 pm at [particulars withheld] Village, Emuhaya District within Vhiga County, intentionally and unlawfully touched the vagina of C O a child aged 4 years with his penis.

3). The appellant after full trial was convicted and sentenced to 21 years imprisonment hence this appeal. The appellant has filed 6 grounds in his petition which can be summarised as follows:

- 1. the trial court erred in relying on the evidence of PW1 to convict.**
- 2. there were contradictory evidence by prosecution witnesses.**
- 3. the trial court failed to consider the defence evidence.**

4). The brief facts of this matter are as follows; PW2 P K , left for the farm between 2 pm and 3.30 pm leaving behind three children namely the complainant who was 4 years 3 months old and two others who were equally young. When she came back from the farm she found the children playing near the gate. The appellant was sleeping next to her house. She called the children to the house whereby the complainant told her that she was sick. Upon removing her clothes she saw some white discharge on her vagina. She told her that the appellant had done some bad things to her.

5). She subsequently took the child to Maseno hospital where she was admitted for one week according to her evidence. **PW1 Dr. Peter Stanley Otiato**, examined the child and she found slimy white discharge

from labia majora and labia minora. The hymen was broken. The slimy discharge was semen. He concluded that the child had been defiled.

6). **PW3 D O**, the complainant's father arrived at the hospital when he was told of the incident. On cross examination he confirmed that the appellant was the son of his landlord and that in the compound there are many other people.

7). **PW4 Boaz Wanga**, is the Assistant Chief Emabungo Sub location. He was informed of the incident by a village elder. He found the child and the appellant at the hospital. Later the appellant was brought to Maseno police station.

The appellant gave sworn defence denying the charges. He admitted that on the material day he was at home preparing a slab for the pit latrine. The two children were playing within the compound when their mother PW2 arrived. According to the appellant when he heard that he was being suspected of defiling the child he went to Maseno hospital to be tested. He was arrested at the hospital. He denied on cross examination that he saw the children that day.

8). His professional witnesses **DW2 Samuel Adulo** and **DW7 Francis Alego** produced their lab results and P3 forms respectively which exonerated the appellant.

9). The court has perused the entire proceedings herein as well as the parties written and oral submissions. The state on its part prayed that the court enhances the sentence pursuant to the provisions of section 354 (3) (a) (ii) of the Criminal Procedure Code. This court is enjoined to reevaluate afresh the proceedings herein with a view of arriving at a fresh independent findings taking into consideration that it is the trial court which had the benefit of seeing the witnesses. See **Okeno -VS- Republic [1972] EA 32**.

10). The big question herein is whether the evidence on record clearly demonstrate that the minor was defiled and if so who did it. The only direct evidence is that of PW1 the doctor. PW2 the mother, only told this court what she saw and that the appellant was the main suspect as was told by the minor.

11). As to whether the minor was defiled, the answer is on the affirmative. PW1 found for a fact that the slimy discharge was semen and that the hymen was broken. He however did not consider whether the hymen was broken as a result of the defilement. This was essential in this regard as one of the ingredients of defilement is penetration. I therefore find that although there was presence of semen in the vagina one cannot conclude that there was penetration to the extent that the hymen was broken. Earlier in his evidence before he was stood down, the PW1 had opined that:

“It was normal for a child like that to have no hymen”.

12). Taking the totality of the above evidence I do not think that it would be safe to conclude that the offence of defilement was clearly established by the prosecution. I find that the alternative charge of attempted defilement would suffice. More importantly however is whether it was the appellant who did the act. The only evidence available is that of PW2, the complainant's mother. Nobody else testified having seen the appellant with the child. The appellant did say that he was at home when PW2 arrived and according to the latter the children were playing at the gate and the appellant sleeping near her house.

13). My understanding is that they all lived within the same compound. The appellant was the son of the landlord of the complainant's parents. Infact PW3 as earlier found stated that there were many other people (tenants) within the compound. Is there a possibility therefore that the complainant was defiled by other person and not the appellant? How sure was PW2 that what the minor was alleging was true. Who else was present at the compound when she left for the farm?

14). I do agree with the appellant's submission that the entire fabric of the prosecution evidence was based solely on hearsay evidence and the star witness was PW2. What was hard for the prosecution to call the child? Even if she was not able to testify, which I find no evidence on record, there was need for her to have been availed. A child of such an age can be classified as a “vulnerable witness” but that does not

necessarily mean that she cannot be availed in court. In any case even if she may be afraid, she can still speak or testify through an intermediary. If she was able to tell her mother what transpired, then surely there was no harm in bringing the same information in court.

15). Consequently, and in light of the above observation I do not think that the prosecution proved their case beyond a shadow of doubt. This appeal is hereby allowed. The appellant is set free unless lawfully held.

Dated, signed and delivered at Kisumu this 25th day of May, 2015.

H.K. CHEMITEI

JUDGE